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IN THE

# Supreme Court of the United States

October Term, 1941.

No. 1020

HELEN VAN ZILE ANTHONY, WILLIAM D. SMITH, and JESSE VAN ZILE ANTHONY as Executor of the Will of FANNIE J. ANTHONY,

*Petitioners,*

*v.*

UNITED STATES TRUST COMPANY OF NEW YORK,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

ELI J. BLAIR,
*Of Counsel for Petitioners.*

THE REPORTER COMPANY, Inc., New York City
1942

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No.

HELEN VAN ZILE ANTHONY, WILLIAM D. SMITH, and JESSE VAN ZILE ANTHONY, Executor of the will of Fannie J. Anthony,

Petitioners,

v.

UNITED STATES TRUST COMPANY OF NEW YORK,

Respondent.

## PETITION FOR WRIT OF CERTIORARI.

The petitioners, Helen Van Zile Anthony, William D. Smith, and Jesse Van Zile Anthony, Executor of the will of Fannie J. Anthony, pray that a writ of certiorari issue to review the decision and order of the Court of Appeals of the State of New York affirming a decree of the Surrogate's Court, New York County, of May 17, 1940, after its affirmance by the Appellate Division of the Supreme Court, First Department of the State of New York and to review the decree of the Surrogate's Court of the State of New York, New York County entered on December 8th, 1941 upon the order on the remittitur and mandate of the Court of Appeals of the State of New York made and entered in the office of the Clerk of the Court of Appeals on November 28, 1941.

## Opinions Below.

The Surrogate rendered an opinion reported in 173 Misc. 1042, and set forth in the record (R. 263-269). The majority of the Appellate Division of the Supreme Court, First Department rendered no opinion. A dissenting opinion was rendered, concurred in by two Justices, reported in 262 App. Div. 703 and set forth in the record (R. 278-284). The Court of Appeals on affirmance rendered no opinion (287 N. Y. 101 [mem.]) and denied reargument without opinion on the constitutional questions presented on the original argument on January 15, 1942 (287 N. Y. [mem.]) (R. 290-295).

## Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, on the basis that the petitioners Helen Van Zile Anthony and William D. Smith were deprived of a trial of the issues of an action pending in the Supreme Court, New York County, and of the property involved therein contrary to the due process provision of the Constitution of the United States in that the Surrogate's Court, New York County decided the issues of said action under the pleadings therein without notice and jurisdiction, on a hearing limited by the pleadings in such Surrogate's Court to the issue of the jurisdiction of that court of a proceeding therein brought, and incorporated the decision of said Supreme Court issues in a decree purporting to settle the accounts of a trustee not in issue and not before the Court. The claim is on the further basis that in said decision the Surrogate made findings of fact against the petitioner, Jesse V. Z. Anthony, as Executor of a life tenant though not a party to said action and having no interest in the account, and that all the petitioners

were adjudged to pay costs of a contested accounting in said decree on the hearing so limited and by the judgments of affirmances thereof, and were thus deprived of their property within the due process provision of the Fourteenth Amendment of the Constitution of the United States.

## Questions Presented.

Can the Surrogate's Court, New York County on a hearing limited by the pleadings filed therein to the trial and decision of an issue demanding dismissal of the proceedings therein, try impromptu, without notice, and without jurisdiction and over objection the issues in a conversion action pending in the Supreme Court, New York County, on the pleadings in said action, and incorporate the decision of said issues thus rendered in a decree purporting to settle the accounts of a trustee which accounts were not in issue by any pleadings at the time of said hearing so limited, and were expressly withheld from settlement until the occurrence of a subsequent contingent event, without depriving the parties to said action of their property involved in said action under the due process provision of the Fourteenth Amendment of the Constitution of the United States?

Can the said Surrogate's Court on a hearing so limited, make findings of fact on the issues in said action against the executor of a life tenant and punitively adjudge in said decree so made that the executor of such life tenant personally pay the costs of a contested accounting, said executor having no interest in said accounting or conversion action and not a party to the action, and having admittedly been paid the income due the life tenant, and no claim having been made to the contrary, and to pay the costs on affirmances on said patently void decree, and can the other petitioners also be adjudged to per-

sonally pay the costs awarded in the above described decree and judgments without violating their rights and taking their property under the due process provision of the Constitution of the United States?

**Statement.**

On October 13, 1935, petitioner, Helen Van Zile Anthony, became entitled to one-third of the residuary estate of Catherine James, her grandmother, which had been left in a testamentary trust with United States Trust Company of New York, hereinafter referred to as the Trust Company, as Trustee for the life of her mother, Fannie J. Anthony, who died on that day (R. 18, 130, 223, 226, 233, 131, 240, 241).

On May 26, 1936, said petitioner, at the direction of the Trust Company (R. 96, 148-149), signed and delivered to it a document called a receipt and release with an account attached, of its acts as Trustee, acknowledging the receipt by her of all the investments of the former trust fund in kind, and releasing the Trust Company from all its acts in relation to the items receipted for, when in fact none of the items receipted for were actually delivered (R. 96, 133-149).

The items of the trust fund so receipted for but not actually delivered included two participations in mortgages, one for $4,500 in a mortgage of $28,000, which it held on property on Third Avenue, and one for $10,000 in a mortgage on $110,000 which it held on property on Madison Avenue, both in New York City (R. 96, 138-139, 121, 187, 122, 190, 194-195). This document, however, was signed on the representation that these participations were excellent investments, and would be paid when due (R. 98, 150-151, 130, 227, 131, 258-259), and on the condition precedent that the said signed docu-

ment did not become effective until the delivery to said petitioner of assignments of said participations free from any agency on the part of the Trust Company to manage these participations (R. 96, 148-149, 98, 153-154). The petitioner had on several prior occasions refused the request of the Trust Company for powers of attorney to manage these participations (R. 96, 149, 113, 121, 187, 121-123, 190-191, 123, 199-201, 106, 178, 126, 216, 130, 234).

Contrary to her rights, the representation aforesaid, and contrary to the document of receipt and release (R. 137-139), and to the condition precedent aforesaid (R. 101, 153-154), the Trust Company and not petitioner (187 N. Y. 101 [mem.]) repudiating its undertakings delivered on June 8, 1936 (R. 159-163) merely a certificate stating that the said petitioner is the owner of a participation interest of $10,000 in a bond and mortgage of $110,000 on the property previously described, and purporting to retain absolute dominion over the participation to the exclusion of said petitioner the owner of said property (R. 123, 202-204).

This document signed only by the Trust Company (R. 123, 204-205) was rejected (R. 105, 170-171). All the other items of the trust estate, specifically enumerated in the document of May 26, 1936, delivered on June 8, 1936, were unreservedly accepted (R. 71-72, 74, 75, 78-79, 82, 86, 87, 90, 102, 103, 131, 242). Negotiations continued for the payment of these participations without prejudice to said petitioner's rights, during the course of which the Trust Company paid the $4,500 participation above described on which a similar certificate had been given (R. 105, 510-511), and unauthorizedly reduced the rate of interest on the $10,000 participation on two occasions, and altered the terms of the mortgage of the said participation against the express prohibition of said

petitioner (R. 125-127, 210-222, 63-64, 131, 247, 101, 107, 182-185).

On November 18, 1939 (R. 231) an action was brought in the Supreme Court, New York County for the conversion of the $10,000 participation, the only undelivered item of the former trust property, by the petitioner William D. Smith, as assignee of the petitioner Helen Van Zile Anthony (R. 130, 223-231).

The Trust Company served an answer (247) admitting that the said petitioner refused the request of the Trust Company for an agency and power of attorney to manage this participation (234), and that the document of May 26th above described was conditionally delivered, adding that the conditions were afterwards dispensed with (235), and as separate defenses the Trust Company pleaded release, account stated, and the statute of frauds (R. 130, 237-238).

Thereafter, the Trust Company on a motion for security for costs in the action alleged that the entire estate had been distributed, except the $10,000 participation involved in the action (R. 131, 242) and later on a motion for a bill of particulars in the action the Trust Company averred that it could not safely proceed to the trial of the action without a bill of particulars, admitting again that the receipt and release had been conditionally delivered (R. 131, 251-252). On the later motion the petitioners, Helen Van Zile Anthony and William D. Smith announced that they demanded a jury trial in the action and intended to examine the Trust Company before trial (R. 231, 255). A bill of particulars was accordingly served (R. 131, 257-262).

On January 9, 1940, two days before the aforesaid motions were presented in the Supreme Court action (R. 239, 249), the Trust Company filed a petition in the Surrogate's

Court, New York County, which, after alleging the creation of the trust above described, and its proceedings as Trustee thereunder (R. 15-18), added that the petitioner Helen Van Zile Anthony has claimed that the said instrument of May 26, 1936, never became effective, and is without consideration (R. 19-20). The action above described is then alleged. The interests of the above petitioners in the former estate are set forth as follows: Helen Van Zile Anthony owner of the entire remainder of the former trust property. William D. Smith assignee of cause of action for conversion, Jesse Van Zile Anthony as executor of life tenant, entitled to unpaid income due life tenant (R. 22).

The Trust Company prays that the validity and effect of the document of May 26, 1936, at issue in the Supreme Court action be determined. In the event that the said document should be determined to be invalid, that the account of the Trust Company, as Trustee, and a supplemental account of its proceedings subsequent to the account of May 26, 1936, "with respect to * * * the portion of the trust estate left in its custody after the distribution of all the assets of which final disposition could be made," be thereafter judicially settled (R. 23).

The account filed is identically the same as the account attached to the document of May 26, 1936, called a receipt and release (R. 24-61, 96, 143-146) and includes the participation involved in the Supreme Court action (R. 39). The supplemental account admits and affirmatively alleges that the $10,000 participation has not been delivered and that it still retains it, and records (R. 63-65, 67-68, 70), payments of the items set forth in the account of May 26, 1936, which were thereafter paid on June 8, 1936, and semi-annual payments of interest under the participation involved in the Supreme Court action, for which credit had been given in that action (R. 62-70, 130, 230-

231). These petitioners were cited pursuant to this petition (R. 21-23, 4-5).

Petitioners herein filed an answer to this petition demanding a dismissal of the proceeding on the ground that the Surrogate's Court was without jurisdiction in the premises, and alleged that all the items set forth in the accounts filed identically the same as the account of May 26, 1936, have been received by the parties named, and are unquestioned, except the undelivered $10,000 participation, concerning which a prior action is pending in which all the issues sought to be tried in the second proceeding are determinable, and have been put in issue by the Trust Company by its answer in the Supreme Court action, while on the contrary, the issues in the said Supreme Court action are not determinable in the Surrogate's Court action. All the acts complained of occurred while the Trust Company purported to act as custodian after its Trusteeship had ended, except the illegality of the investment in the $10,000 participation (R. 71-77). All the income due the life tenant has admittedly (R. 18) been paid to her executor (R. 75), who signed (R. 141), but did not and is not claimed to have attacked (R. 19-20) the instrument of May 26, 1936.

This answer is addressed solely to the jurisdiction of the Court to entertain the proceeding. It does not put in issue the participation in issue in the prior action or any item of the account which is done by filing objections to the account. The petition, account and objections, when filed, constitute the pleadings on the merits of the issues set forth in the petition and account. No objections were filed because obviously an answer to the merits would have been inconsistent with an application to dismiss for want of jurisdiction and the account was expressly withheld from settlement until the document of May 26, 1936, was declared invalid.

The Trust Company served a reply to that answer in which all these statements of the answer are admitted (R. 78-79).

The Trust Company then moved in the Supreme Court action, returnable in the Surrogate's Court, to transfer the trial of the conversion action from the Supreme Court to the Surrogate's Court.

The Surrogate who made the decree herein in a decision made in 1934 (*Matter of Pfersich,* 153 Misc. 609), annunciated the statutory limitation on the jurisdiction of the Surrogate's Court to try the issues of Supreme Court actions as follows:

By Section 40, subdivision 9 of the Surrogate's Court Act, authority and power is given to transfer law actions pending in other courts affecting the administration of estates to the Surrogate's Court.

A Supreme Court action under Section 190a of the Civil Practice Act can be transferred only by the Supreme Court in its discretion upon the prior order of the Surrogate, but right to a jury trial is preserved.

By Section 168 of the Civil Practice Act, provision is made to stay the Supreme Court action pending an application to transfer it to the Supreme Court.

By Section 41 of the Surrogate's Court Act jurisdiction is conferred over the parties to the Supreme Court Action after it has been transferred to the Surrogate's Court.

By Section 65 of the Surrogate's Court Act, authority is given the Surrogate's Court to consolidate the Supreme Court action after it have been transferred to the Surrogate's Court, with a pending accounting or other proceeding in the later Court.

The purpose of these enactments was to expedite distribution of an estate to creditors and beneficiaries which

might be delayed several years owing to the congested calenders in the Supreme Court.

The power thus conferred is to be used sparingly and only where injustice, delay and needless expense would result, if the transfer was not made.

See also *Matter of Pedrette,* 153 Misc. 106.

Therefore the Surrogate's Court has no power or jurisdiction to try a Supreme Court action or over the parties to such action until an order has been made by the Supreme Court directing the transfer of such action to the Surrogate's Court with all the attendant rights of a Supreme Court action including a jury trial. No order can be made transferring a Supreme Court action to the Surrogate's Court, unless there is a pending proceeding in the Surrogate's Court and the determination of the action is necessary for the completion of an estate (*Matter of Franklin,* 153 Misc. 110, 111).

The Surrogate over objection made an order giving his consent to the transfer of the action to that court (R. 184, 85-86, New York Law Journal, February 3, 1940, p. 550).

The Trust Company then moved in the Supreme Court for an order transferring the action to the Surrogate's Court (R. 80-81). This motion was opposed upon the ground *inter alia* that the jurisdictional issue under petitioner's answer in the Surrogate's Court was pending and undetermined.

(The text of Sections 40, subdivision 9, 41, subdivision 4 and 65 of the Surrogate's Court Act, and Sections 168 and 190 (a) of the Civil Practice Act is annexed as an appendix to this application with the applicable parts italicized for convenience.)

When the motion to transfer the action was still pending and undecided in the Supreme Court the Trust Com-

pany served notice of hearing ostensibly on the answer filed demanding a dismissal for want of jurisdiction, as that was the only issue raised by the pleadings and presumably to have that issue determined as a basis for the decision of the Supreme Court motion (R. 271).

At the opening of the hearing the petitioners uncontradictedly announced that the hearing was limited to the trial of the issues set forth in the answer demanding a dismissal of the proceeding (R. 80, 82-83, 86, 87-89, 110, 111) and delivered a trial memorandum to the Surrogate, and a copy to the Trust Company (R. 85) limited to a discussion of the issues raised by their answer.

Contrary to due process of law, the Trust Company with the acquiescence of the Surrogate, proceeded to try all the issues under the pleadings in the Supreme Court action (R. 107, 109-110, 119, 120) on a hearing restricted by the pleadings in the Surrogate's Court to a dismissal of the proceeding for want of jurisdiction over the objection of the petitioners (R. 97, 100, 110-111), although deprived of the right to fully set forth their position and objection on the record (R. 110-121, 101). It also proceeded to prove its account deferred by its petition until after the alleged release, in issue in the Supreme Court action was declared invalid (23), and unquestioned in any event by petitioner J. V. Z. Anthony, as to payments to him as executor of the life-tenant, the only item in which he had any interest, and to which no objections had been or could then be filed (R. 18, 75).

The petitioners involved were directed on the hearing to produce their evidence on the issues in the Supreme Court action of that day on that hearing on the application to dismiss on jurisdictional grounds (R. 110-111), without notice and to respect the Court's rulings (R. 121).

Attempting to divest the Supreme Court of its judicial powers, the Surrogate directed the Trust Company on

that hearing to notify the Supreme Court, *ex parte,* to sever the action, and send him that part which related to all the issues in the Supreme Court action prior to June 8, 1936, and to retain the balance of the issues after that date for trial in the Supreme Court (R. 112, 127, 128). Later, divesting the Supreme Court of its power, he ruled that without any order of the Supreme Court he would and did decide all the issues prior to June 8, 1936 (R. 127-128, 132, 267-268).

The Surrogate several days after the hearing (173 Misc. 1042) decided all the issues under the pleadings in the Supreme Court action as to all occurrences to June 8, 1936, the date upon which he held that the securities constituting the trust fund "capable of delivery" (R. 264), receipted for on May 26, 1936 (R. 113) had been actually delivered to the remainderman (137-140, 159-163, 266). The Surrogate held that the delivery of the $10,000 participation was evidenced by the delivery of a certificate stating that it held the participation (R. 6-7). The Surrogate further held that the Trust Company after June 8, 1936, was custodian and not trustee of the participation decreed as delivered but actually retained by the Trust Company (R. 84, 85, 102, 103, 112, 115, 118, 119, 268, 269) with all the arrogated powers previously described, and hence the Surrogate is without jurisdiction after that date (R. 6-7, 13-14) and held that the parties involved could carry on the conversion action as to all issues after June 8, 1936 (R. 108, 111, 112, 113, 116, 120, 127-129, 268).

In the absence of jurisdiction and of any pleadings in the Surrogate's Court, and denying the petitioners interested in the action a right to a jury trial and to any trial and to an examination before trial, and in the absence of any evidence, the Surrogate later and on May 17, 1940 (R. 4) made adverse findings of fact against

all petitioners in a decree purporting to settle the account of the trustee not in issue on all the issues in the Supreme Court action to June 8, 1936, thus taking from the interested petitioners $10,000 and accrued interest without due process of law (R. 4-14, 287).

Although the Surrogate ruled that the interested petitioners had the right to proceed in the original Supreme Court law action on all the issues after June 8, 1936, his decree adjudges that these issues were triable in a court of equity (R. 14). The decree punitively awards costs of a contested accounting in the sum of $304.47 against all these petitioners personally, although (R. 131-132, 14) the account was not in issue under the prayer of the petition (23) and no objections had been filed. The petitioners were present merely to demand a dismissal on their respective claims alleged in their joint answer and proved on the hearing and that the Surrogate's Court had no jurisdiction of any subject-matter presented.

On September 25, 1940, an order was made by the Supreme Court, on the application of the Trust Company and after petitioners' brief in the Appellate Division had been served withdrawing the motion to transfer the action to the Surrogate Court, still pending and undecided (*Smith vs. U. S. Trust Company,* New York Law Journal, September 26, 1940, p. 798, Levy, J.)

An appeal was taken to the Appellate Division of the Supreme Court, First Judicial Department, an intermediate Appellate Court, from the decree of the Surrogate. The Appellate Division made an order on May 2, 1941, affirming the decree appealed from without opinion (R. 276, 278). Two of the Justices joined in a dissenting opinion, holding that the proceeding in the Surrogate's Court should have been dismissed, for the following reasons: (1) the settlement of the accounts un-

der the petition of the Trust Company was not in issue because the settlement thereof was deferred until the document of May 26, 1936, in issue in the Supreme Court action was declared invalid (R. 280); (2) the Surrogate had no jurisdiction in the premises (R. 281); (3) a pending prior action barred the proceeding (R. 282-283); (4) all the issues involved between the parties were determinable in the Supreme Court action, and were not determinable in the Surrogate's Court (R. 283; (5) the proceeding in the Surrogate's Court was wholly unnecessary, and the interested petitioners should be permitted to proceed with the original action in the Supreme Court (R. 284-285). On the remittitur of the Appellate Division, a further decree was entered in said Surrogate's Court, affirming the said decree, and assessing costs against the petitioners in the sum of $139.43 (R. 277).

On May 29, 1941, the petitioners herein appealed to the Court of Appeals of the State of New York from the order of affirmance of the Appellate Division of the decree of the Surrogate's Court entered May 17, 1940 (R. 275). On the said appeal, when it first appeared that petitioners constitutional rights had been invaded, the petitioners argued and set forth in their briefs that by the proceedings had, the said petitioners had been unconstitutionally deprived of a jury trial and of any trial of the issues involved in the prior conversion action, and that the decree findings and adjudications were unconstitutionally made without any pleadings upon which to base them and were illegally made under the issues presented by the pleadings without jurisdiction and notice and unconstitutionally deprived the petitioners of a trial of these issues in the prior action and demanded a reversal on those grounds and the constitutional right to try the issues in the Supreme Court action. Although unnecessary to file specifications or assignments of error under the appellate prac-

tice prevailing in New York State, all the claims set forth in the following specifications of error were submitted in support of the foregoing constitutional claim (R. 290-294).

On November 28, 1941, the Court of Appeals made an order affirming the order of the Appellate Division in all respects, without opinion, and sending its remittitur to the Surrogate's Court of New York County to be enforced according to law (R. 285-286). On December 8th, 1941, the Surrogate's Court entered a decree on the remittitur and mandate of the Court of Appeals, which is the highest court of appellate jurisdiction in the State of New York, affirming in all respects the order of the Appellate Division, and the decree originally entered, and assessing costs against these petitioners in the sum of $177.80 (R. 286-288).

On January 5, 1942, the petitioners moved for a reargument of the said appeal in the Court of Appeals pointing out the Constitutional claims above asserted, specifically enumerating them, which had been made in the briefs on the original argument in that Court.

These petitioners on said motion reiterated their claim that the Fourteenth Amendment of the United States was relied upon in making these Constitutional claims, and that the infringement followed by a mere recital of the items of the claims without citation of any authorities, which was the reason for the inadvertent omission to cite the controlling authorities cited in the reargument brief (R. 289-294). The Trust Company did not contradict these averments by affidavit (R. 288-295) and clearly indicated that the petitioners' claim was based upon the Federal Constitution. The motion for reargument which record is lodged in the Court of Appeals, was denied on January 15th, 1942, without opinion (R. 295; 287 N. Y. [mem.]).

## Specification of Error.

The petitioner, Helen Van Zile Anthony, owning the beneficial interest in the property involved, and her assignee, the petitioner William D. Smith, holder of the legal title thereto, were summarily divested of their property and of their right to a trial of the issues of an action brought by them in a court of competent jurisdiction by the following acts and adjudications of the Surrogate's Court of New York County, as affirmed by the Court of Appeals of New York State on a hearing limited by the pleadings to the trial and decision of an application to dismiss the Surrogate's Court proceeding, without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

1. Trying and deciding the issues of the conversion action pending in the Supreme Court, New York County under the pleadings in that action, without notice and without an order of the Supreme Court transferring the action to the Surrogate's Court, and without jurisdiction, with full knowledge that a motion was pending undecided in the Supreme Court to transfer the action to the Surrogate's Court.

2. Directing the Trust Company, *ex parte,* to notify the Supreme Court Justice before whom the motion to transfer the action was pending, to decide the motion as directed by him, and to make an order severing the Supreme Court action, and to send him all the issues in the prior action to June 8, 1936, and to retain the balance of the issues in the Supreme Court for trial in that court, and later deciding all the said issues in said conversion action in the Supreme Court without an order transferring the order of the Surrogate's Court, and without notice and without jurisdiction.

3. Settling the account of the Trustee which declared that the participation involved in the Supreme Court was undelivered and still in its possession and in the absence of any pleading in the Surrogate's Court, putting in issue any of the items of said account, and contrary to the petition of the Trust Company deferring judicial settlement of the account until after the alleged release was declared invalid without notice to the petitioners and without jurisdiction.

4. Consolidating the issues of the Supreme Court conversion action with a proceeding brought for the determination of the validity of an alleged release, and for a judicial settlement of account only after the alleged release was declared invalid, *ex parte* and orally upon said hearing, without the entry of an order and without notice to the petitioners and without jurisdiction.

5. Directing the petitioners involved in the conversion action impromptu and extempore on the said hearing to produce their evidence on the issues in the Supreme Court conversion action not in issue on that hearing, and on that day without notice to the petitioners, and in the absence of any order transferring the Supreme Court action to the Surrogate's Court and without jurisdiction.

6. Trying and deciding the issues in the said conversion action without order of the Supreme Court, with full knowledge that the application to dismiss the Surrogate's proceeding was in part based upon the ground that a prior action was pending in which all the issues between the parties were determinable, and were not in the proceeding brought in the Surrogate's Court, and without notice to the petitioners and without jurisdiction.

7. Finding on said hearing that the investment in the participation involved in the prior action was properly

made and administered, not in issue under the pleadings in the Surrogate's Court, and without jurisdiction.

8. Finding that the accounting and delivery of the document of May 26, 1936, were made without any representations as alleged in the complaint and bill of particulars in the Supreme Court action not in issue under the pleadings in the Surrogate's Court without evidence, and in the absence of any order transferring the action to the Surrogate's Court and without jurisdiction and without notice.

9. Finding on that hearing the propriety of the administration of all investments and the performance of the Trustee's duties to June 8, 1936, without notice, and not in issue under the pleadings, without evidence, and in the absence of any order transferring the Supreme Court action to the Surrogate's court and without jurisdiction.

10. Finding that the alleged release of May 26, 1936, is binding and conclusive to June 8, 1936, and that the remainderman receipted for the securities and agreed to receive the certificate of participation, and that the sworn statements in the complaint in the Supreme Court action that the document of May 26, 1936, was conditionally delivered, were fictitious, without evidence in the absence of the order previously described, and of any pleadings upon which to base the finding and without jurisdiction and without notice.

11. Finding that the receipt of June 8, 1936, discharged the Trust Company of all liability and constituted an acceptance of the certificate of participation not in issue under the pleadings, and without notice, and without a trial, and in the absence of any previously described order of transfer and without jurisdiction.

12. Finding that the remainderman is barred by the document of May 26, 1936, and that by the receipt of June 8, 1936, the remainderman agreed to accept the certificate of participation delivered, and that the decree is conclusive as to the validity of the document of May 26, 1936 to June 8, 1936, not in issue and without a trial and without jurisdiction and without notice.

13. Finding that the remainderman had been guilty of a breach of contract and perfidy with relation to the issues involved in the pleadings in the conversion action, in the absence of any pleadings and evidence and without jurisdiction and without notice.

14. Trying and deciding the conversion action in the absence of any order transferring the action to the Surrogate's Court without notice, with full knowledge that petitioners involved in said action claimed and were entitled to a jury trial of the conversion action and without jurisdiction and without notice.

15. Petitioner Jesse Van Zile Anthony as Executor of the life tenant, not a party to the conversion action and not interested in the account, was similarly deprived of his property by making the decisions and findings aforesaid against him.

16. Punitively awarding costs against all the petitioners of a contested accounting when the account was not and could not be put in issue under the prayer for relief set forth in the Trust Company's petition, and hence under a void decree similarly deprived them of their property.

**Reasons for Granting the Writ.**

The petitioners Helen Van Zile Anthony and William D. Smith, her assignee, have been deprived of a trial of issues framed in the action pending in the Supreme Court, New York County, without notice, and without jurisdiction, and contrary to the pleadings in the Surrogate's Court and by the decision and decree of the Surrogate's Court of the issues of the Supreme Court action under the pleadings in that action, have been barred from trying such Supreme Court action contrary to the due process of law provision of the Fourteenth Amendment of the Constitution of the United States, by which said petitioners have been deprived of their property.

All of the petitioners have been deprived of their property without due process of law and contrary to provision of the Fourteenth Amendment of the Constitution of the United States by the usurpation of jurisdiction by the Surrogate to try an issue not before it, by the imposition of costs of a contested accounting, when no contested accounting was before it and by the judgments for costs on affirmances of a void decree and in which petitioner Jesse Van Zile Anthony as Executor had no interest.

Dated, New York, February 23rd, 1942.

Respectfully submitted,

ELI J. BLAIR,
Counsel for Petitioners.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### I.

**The decision and decree of the Surrogate having been rendered on issues not within and not responsive to the pleadings before that Court and not litigated and having been made without any pleadings upon which to base them and upon pleadings in an action pending in the New York Supreme Court without jurisdiction, are void under the due process provision of the United States Constitution.**

*Cole v. Armour Fertilizer Works,* 237 U. S. 413, 419, 426.
*Reynolds v. Stockton,* 140 U. S. 254, 264, 265, 268.
*Windsor v. McVeigh,* 93 U. S. 274, 282.
*Standard Oil Company v. Missouri,* 224 U. S. 270, 281-282.
*Brinckerhoff-Faris Co. v. Hill,* 281 U. S. 673, 678-680.
*U. S. v. Goldstein,* 271 Fed. 838, 845.
*In re Conservative Mortgage & Guaranty Co.,* 24 Fed. (2) 38, 41.

The basic claim made by the petitioners, Helen Van Zile Anthony and her assignee, William D. Smith, is that they have been deprived of a trial of the issues and charges made in the complaint in the conversion action and put in issue by the Trust Company in that action resulting in the summary taking of their property without due process of law.

The answer filed by petitioners to the petition of the Trust Company, putting in issue solely the jurisdiction of the Surrogate's Court was in conformity with settled and proper practice.

*Matter of Kelly v. Langevin,* 153 App. Div. 322, 323.
*Matter of Cary,* 77 Misc. 602, 603-604, affirmed 155 App. Div. 946.
*Matter of De Pierris,* 79 Hun 279.
*Matter of Andrews,* 172 Misc. 373.
*Matter of Kirkman,* 143 Misc. 342, 343.
*Matter of Hearn,* 158 Misc. 371, 372.

The practice is analogous to a demurrer to the jurisdiction of the Court, to avoid, if possible, a lengthy and expensive accounting proceeding. No issue can be raised with reference to the merits of the matters set forth in the petition and account until after the jurisdictional issue is decided. In the event of an adverse decision on the issue of jurisdiction, the items of the account are put in issue by filing objections to the petition and account. The petition and account and objections thereupon constitute the pleadings similar to a complaint and answer and define and limit the issues to the merits of the account.

*Matter of Doelger,* 254 App. Div. 178, 182, aff'd 279 N. Y. 646.
Rule XI, N. Y. County Surrogates' Rules.

(A copy of the above rule is annexed hereto in the appendix.)

No objections could be filed here for the following reasons:

(1) The settlement of the account was deferred until after the alleged release was declared invalid, hence no objections could be filed until that time (R. 23) and no objections could be filed to the participation because the Trust Company maintained it still held it and a decree cannot adjudicate claims as to undelivered property.

*Meredith v. First Trust Co. of Albany,* 260 App. Div. 517, 520.
*Joseph v. Herzig,* 198 N. Y. 456, 461, 463.
*Matter of Denbosky,* 245 App. Div. 93.

(2) The filing of objections would have been inconsistent with the basic claim that no accounting was necessary, and that the Surrogate's Court had no jurisdiction of the subject-matter, as it would have been an anomaly to set up this basic issue and proceed to a trial of the very issues which these petitioners contended were triable by a jury in the prior action. The simultaneous filing of an answer attacking the jurisdiction and an answer putting in issue the merits of the petition and account filed would have been tantamount to the simultaneous filing of a demurrer to a bill of complaint, and an answer to the merits of the same complaint.

(3) A prior action was pending in which all the issues between the parties were determinable, and which are not determinable in the Surrogate's Court, as the Surrogate ruled (R. 14).

*Farmers' Loan & Trust Company v. Lake St. R. D. Co.*, 177 U. S. 51, 61.
*Colson v. Pelgram*, 259 N. Y. 370, 374, 375.
*Ludwig v. Baumgart*, 48 App. Div. 613.

(4) The Surrogate had no jurisdiction to try the issues in the Supreme Court action until the Supreme Court so ordered.

It thus appears that at the time of the hearing the issues in the Supreme Court action could not be tried on that hearing under an attempt to judicially settle the account. No objections had been or could be filed to the account, and hence no items of the account were then in issue. Hence the only issue pending under the answer filed was to the jurisdiction of the Court. Hence this was not a "contested accounting" (R. 263).

Under Section 40, Subdivision 9 of the Surrogate's Court Act and Section 190a of the Civil Practice Act the Surrogate's Court has no jurisdiction to try an action

pending in the Supreme Court until an order is made by the Supreme Court directing such trial which preserves the attendant right to a jury trial.

*Matter of Pfersich,* 153 Misc. 609.
*Matter of Pedrette,* 153 Misc. 106.

A Supreme Court action cannot be consolidated with a proceeding in the Surrogate's Court under Section 65 of the Surrogate's Court Act until an order has been made by the Supreme Court transferring the action to the Surrogate's Court, and none was made in this instance.

*Matter of Franklin,* 153 Misc. 110.

In *Matter of Pfersich,* 153 Misc. 609 (*supra*), the Surrogate, who made the decree here, said at page 610:

> "Where an action is pending in the Supreme Court, transfer may *only* be made under the terms of the new amendments in the discretion of the Supreme Court upon the prior consent of the Surrogate evidenced by his order."

In *Matter of Franklin,* 153 Misc. 110 (*supra*), the Surrogate, referring to the trial of a Supreme Court action in the Surrogate's Court, said:

> "If *thereafter* the Supreme Court shall determine to transfer the action to this court, it will upon such transfer be consolidated with the then pending accounting proceeding."

Referring to an application to try the issues under the pleadings in a Supreme Court jury action upon an accounting proceeding in the Surrogate's Court, made prior to the enactment of Section 40 Subdivision 9 of the Surrogate's Practice Act and Section 190a of the Civil Practice Act in 1934, permitting such trial upon an order made by the Supreme Court, the Surrogate, who

made the decree herein, then said in *Matter of Harkness,* 119 Misc. 361, 362:

> "There is no authority for the trial of the issues in the Surrogate's Court upon the pleadings in another *form*" (*sic*).

He also said:

> "He should proceed with his pending action in that court, if he desires a jury trial."

He concluded that the only method in which the issues in the Supreme Court action should be determined on an accounting was by withdrawing that action and filing a claim *de novo* in the Surrogate's proceeding.

Hence, on the hearing under the answer to dismiss the proceeding for want of jurisdiction, the Surrogate's Court had no jurisdiction to try the issues in the Supreme Court action under the pleadings in that action, or to consolidate and try the issues in the Supreme Court action on that hearing.

When, therefore, on March 28, 1940, the Trust Company served notice "that this proceeding will be brought on for hearing and trial before Mr. Surrogate Foley at a Term of this Court to be held * * * on April 12, 1940 * * *" (R. 271), the only issues triable were those set forth in the answer of these petitioners. However, the issue to be tried is governed by the pleadings and not by the notice of hearing and under the answer filed was limited to the allegations set forth in the answer attacking the jurisdiction.

*Pepper v. Litton,* 308 U. S. 295, 303.
*Wright v. Delafield,* 25 N. Y. 266, 270.

The Surrogate, therefore, in deciding all the issues in the Supreme Court action, and making a decree thereon without jurisdiction, without notice, and without af-

fording an opportunity to petitioners to be heard, and without pleadings raising those issues in the Surrogate's Court, stripped the petitioners of their property without due process of law.

*Chisholm v. Gilmer,* 299 U. S. 99, 102.

The decree and decision must be construed with reference to the issues it was meant to decide.

*Vicksburg v. Henson,* 231 U. S. 259, 269.

The following allegations of the complaint in the Supreme Court action were adjudicated on the hearing to dismiss, in the absence of any pleadings.

1. The mortgage participation involved was really a fourth mortgage and made a first mortgage by consolidation of three prior mortgages under the guidance of the Trust Company, which investment was made without any appraisal or investigation, and was not a proper investment (R. 130, 223-226).

The Surrogate found and adjudged that all investments had been properly and suitably made and administered to June 8, 1936, and paid to the remainderman and to the executor of the life tenant (R. 12, 268).

Not only were the said petitioners deprived of their constitutional right to submit their evidence on this issue, and not only was the finding made in the absence of any pleadings upon which to base the adjudication, but the Trust Company produced no evidence in support of the finding. It was made in the absence of any evidence whatever. The said petitioners involved in that action were deprived of the right to submit evidence on a proper trial including that of real estate experts showing the value of the property at the time the participation was allocated to the trust, and that no appraisal was made at that time.

2. The representations made by the Trust Company with relation to the investment (R. 130, 227, 131, 259-260).

The Surrogate found that the accounting and delivery of the document of May 26, 1936 were made without any representation as alleged in the complaint and bill of particulars in the Supreme Court action and on the hearing prejudged this issue (R. 12, 109-110).

There is no evidence whatever in the record to sustain this finding. The petitioners involved were bereft of the right to submit their evidence upon this issue, both under the allegations of the complaint and under the allegations of the bill of particulars (R. 131, 259-260).

3. The unlawful reduction of interest and the complaint made thereon prior to June 8, 1936 (R. 130, 227, 229-230).

By three findings said petitioners have unconstitutionally been deprived of the right to try this issue: (a) the account is judicially settled (R. 11); (b) the propriety of the administration of all investments is adjudged (R. 12); (c) the Trustee's duties have been fully performed, and it has fully accounted for its acts, and proceeding to June 8, 1936 (R. 13). The petitioners have been deprived of their right to submit their evidence on this issue upon a proper trial, and under proper pleadings. In fact, the findings are contrary to the Court's opinion (264), and the evidence produced upon the hearing (182, 101, 185).

4. The condition precedent upon which the document of May 26th was signed, and the breach thereof after refusal of any agency to the Trust Company by the remainderman of the participation involved (R. 130, 226-228).

The Court found the alleged release binding and conclusive to June 8th 1936 when the remainderman receipted for the securities and that she agreed to accept the certificate of the participation of the bond and mort-

gage, and that her sworn statements in the complaint in the Supreme Court action that the document of May 26, 1936 was conditionally delivered (R. 228) and admitted by answer of the Trust Company in that action (R. 235) were fictitious (R. 7-8, 11-12, 267).

Not only is this determination without the scope of the pleadings presented for hearing, but it is contrary to the documentary evidence of the Trust Company.

The Trust Company in its answer after alleging that the release was conditionally delivered, adds that the conditions were thereafter dispensed with (R. 130, 235). No evidence that these conditions were dispensed with was adduced by the Trust Company. There is but merely a receipt by the remainderman acknowledging delivery of whatever documents the Trust Company had sent (R. 103, 163). The remainderman, however, had no opportunity to present her evidence regarding the circumstances under which this receipt was signed, and to explain it.

On its motion for a bill of particulars the Trust Company again admits that the receipt and release was conditionally delivered (R. 131, 251). It was specifically shown in the following letters submitted in evidence by the Trust Company: May 27, 1936 (R. 101, 154-155), June 3, 1936, July 13, 1938, July 20, 1938 and August 23, 1938 (103, 158, 106, 173, 178, 107, 182). It was also admitted by the Trust Company upon the trial (R. 101). However petitioners involved were unconstitutionally barred from submitting the entire evidence on this issue on a proper trial under proper pleadings.

5. The rejection of the certificate of participation, and the negotiations for payment to excuse the delay in beginning suit (R. 130, 229).

This allegation is disposed of by the finding that all the objections of the petitioners are overruled, although none were or could be filed (R. 13), and by the further finding that the receipt of June 8, 1936 discharged the Trust Company from all liability and constituted an acceptance of the certificate (R. 13, 266). The Trust Company itself submitted a letter showing that the certificate had been rejected from the time of its delivery (R. 105, 170-171).

6. Disposing of the issues of the defense of release and account stated, set up in the answer in the Supreme Court action, the Court finds that the remainderman is barred by the document of May 26, 1936, and it is binding upon all the petitioners because by the receipt of June 8, 1936 the remainderman agreed to accept the certificate of participation delivered, and that this decree is conclusive as to the validity of that document to June 8, 1936 (R. 7-8, 11-12, 13-14). These findings are based upon the opinion of the Surrogate rendered without jurisdiction or pleadings or proper evidence and depriving petitioners of a trial. The Surrogate announces that the facts are identical with cases enumerated by him (R. 263). On the Trust Company's evidence they are not, because in those cases complaint was made that the signer of the release did not understand the purport of it. Here, as shown by the bill of particulars, the remainderman made emphatic objections to the participation, and was lulled into silence by the representations of the Trust Company, and by the agreement of the Trust Company to deliver to her an absolute assignment, to which she was entitled (258-260). The Surrogate adds that the remainderman had the benefit of counsel (263-264). The record shows the remainderman had counsel but four days before the document of May 26, 1936 was signed (99-100, 133).

It therefore follows from a review of these findings that they are all made contrary to the pleadings under which the hearing was had, and purported to try the issues in another action without due process of law, resulting in the deprivation of the petitioners involved in that suit of their property.

In *Coe v. Armour Fertilizer Works,* 237 U. S. 413 *(supra),* an execution was issued against the property of the plaintiff in error, pursuant to a Florida statute, without pleadings and without trial on the ground that he was a stockholder whose stock was not paid for, and an execution against the corporation had been returned unsatisfied. This Court said at p. 419:

> "It would seem plain that any course of procedure having for its object the taking of property to satisfy an alleged legal obligation, and which yet accorded no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land, could itself hardly be termed 'due process of law.'"

The Court further said at p. 426:

> "For in this case there was no pending action or issue; plaintiff in error came into court to object, on jurisdictional grounds, to the execution of final process upon his property. And the effect of the decision under review was to convert his petition, which simply raised an issue of law under the state constitution and the Fourteenth Amendment into a tender of an issue of fact respecting his status as a stockholder and the amount of his unpaid subscription, if any, and then to hold him concluded upon the latter issue for failure to introduce evidence bearing upon it. In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this, without his consent—and the record shows no consent—is contrary to fundamental principles of justice. *Reynolds v. Stockton,* 140 U. S. 254, 268, 269."

The ruling is particularly applicable here. The petitioners here came into court to object on jurisdictional ground to the Surrogate's proceeding. The effect of the decision under review here was to convert the petitioner's answer here, which simply raised an issue of law, into a tender of an issue of fact relating to all the issues in the Supreme Court action which were not at issue in this proceeding, and to hold these petitioners concluded by these findings. In so doing here the Surrogate in effect rendered judgment upon a matter that was not within the pleadings, and which was not in fact litigated. To do this is contrary to fundamental principles of justice.

In *Reynolds v. Stockton,* 140 U. S. 254 (*supra*), cited in the above authority, a judgment had been made contrary to the allegations set forth in the pleadings. This Court, in its opening sentence there, said at p. 264:

> "We are of opinion that the decision of the Chancery Court of New Jersey, as sustained by the Court of Errors and Appeals of that State, is correct, and must be affirmed. The first and obvious reason is that the judgment of the Supreme Court of New York was not responsive to the issues presented."

The Court further said at p. 265:

> "Take an extreme case: Given a court of general jurisdiction, over actions in ejectment as well as those in replevin; a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same State. If not there, the constitutional provision quoted gives no greater force to the same record in another State."

The ruling is applicable here. On an issue to the jurisdiction of the Court, findings are made in an action for conversion. The Court made the following pertinent ruling, which is applicable here (p. 265):

> "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted."

The Court in its summary fully sustains petitioner's violated constitutional rights here asserted saying (p. 268):

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in

> question, that a power of judicial decision arises.' And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated * * *.'"

In *Standard Oil Company v. Missouri,* 224 U. S. 270 (*supra*), this Court held that even assuming the Surrogate here had jurisdiction over the subject matter of the proceeding, he could make no decision beyond the scope of the pleadings. The Court said at pages 281-282:

> "For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based."

Quoting from *Windsor v. McVeigh,* 93 U. S. 274, 282, the Court continued:

> "Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will * * *. The judgments mentioned, given in the cases supposed, would not be merely

> erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.' *Windsor v. McVeigh,* 93 U. S. 274, 282. See also *Reynolds v. Stockton,* 140 U. S. 254, 265-268; *Barnes v. Railway,* 122 U. S. 1, 14."

The Court would undoubtedly have added if the question was presented that when a pleading is addressed solely to the jurisdiction of the Court demanding a dismissal of the proceedings on the facts pleaded that a Surrogate cannot try all the issues in a conversion action pending in another Court under the pleadings in that action.

In re *Conservative Mortgage & Guaranty Co.,* 24 Fed. (2nd) 38 (*supra*), the Sixth Circuit Court of Appeals again assuming that the Court had jurisdiction held that it must make a decree or judgment solely within the confines of the pleadings, and said at p. 41:

> "Assuming, for the purposes of this opinion, that the municipal court might, were its powers duly invoked, exercise all the powers of a court of common pleas in respect to a general creditors' bill for the administration of a judgment debtor's estate, yet the question whether jurisdiction other than in aid of the judgment creditor's execution existed, must be determined by the pleadings therein. Mere possession of such power is not of consequence, unless the power is properly invoked; not by the court on its own motion, but by some act of the suitor concerned, and in some mode recognized by law. Freeman on Judgments, § 338. 'In the absence of statute to the contrary, it is a general rule that the relief to be awarded by a judgment is limited to that sought by the pleadings, or incidental to such relief. * * * The right to recover depends not upon the prayer, but upon the scope of the pleadings and the issues made or which might have been made under them. A

> material variance between the relief sought and that awarded is fatal to the judgment * * *' 33 Corp. Jur. p. 1144, §88; *Id.* p. 1072, §34; *Standard Oil Co. v. Missouri,* 224 U. S. 270, 32 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936."

In *U. S. v. Goldstein,* 271 Fed. 838, 845 (*supra*), the Eighth Circuit Court of Appeals said:

> "A judgment upon a matter not within the pleadings and not litigated is void, being contrary to fundamental principles of justice. *Reynolds v. Stockton,* 140 U. S. 254, 11 Supp. Ct. 773, 35 L. Ed. 464; *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 426, 35 Sup. Ct. 625, 59 L. Ed. 1027. 'A decree has to be founded on the *allegata* as well as *probata* of the case.' *Putnam v. Day,* 89 U. S. (22 Wall.) 60, 66 (22 L. Ed. 764); *Hendryx v. Perkins,* 114 Fed. 801, 806, 52 C. C. A. 435."

Here the decree was neither *secundum allegata neque probata.*

The decision is applicable to petitioner, J. V. Z. Anthony. The Court there held that findings of fact against persons not parties to the action wherein they were made are void. Here after the hearing the Surrogate made findings against this petitioner on issues in an action in which he was not a party.

It therefore follows that this decree made without jurisdiction under the pleadings in another action in another court on a hearing addressed solely to the jurisdiction of the Court and wholly outside of the issues framed by the answer filed is void and that these petitioners have been unconstitutionally deprived of their property under the due process of law provision of the United States Constitution.

## II.

**The petitioners involved were deprived of any trial of the issues framed by the pleadings in the Supreme Court action and without notice were deprived of their property, contrary to the due process of law provision of the Constitution of the United States.**

*Frank v. Mangum,* 237 U. S. 309, 326.
*Palko v. Connecticut,* 302 U. S. 319, 327.
*Ohio Tel. Co. v. Commission,* 301 U. S. 292, 304-305.
*Truax v. Corrigan,* 257 U. S. 312, 332.
*Sanders v. Shaw,* 244 U. S. 317.
*Georgia Ry. & El. Co. v. Decatur,* 295 U. S. 165, 171.
*Jensen v. Union Pac. Ry. Co.,* 6 Utah 253 (4 L. R. A. 724).
*Windsor v. McVeigh,* 93 U. S. 274, 277.
*Stuart v. Palmer,* 74 N. Y. 183, 191.

The Surrogate summarily directed that the issues of the conversion action be presented by petitioners on that hearing (R. 110, 130-131), and proceeded to receive the *ex parte* evidence of the Trust Company without notice and without pleadings (R. 110, 130-131).

The command of the Surrogate to petitioners to proceed with the trial of the issues in the conversion action did not involve discretion. It did not involve local practice or procedure. It involved the inalienable right to a trial including the right to submit evidence of the issues involved in the conversion action under the fundamental law of the land. The petitioners could not, if they would, have produced their evidence instanter on that hearing, when it justifiably came prepared to and did try the issues under the answer filed in a court that had no jurisdiction under the law, and the pleadings to determine any other issue.

Orderly procedure and justice demanded assuming the Surrogate had jurisdiction notice and an opportunity to be heard, prior to the attempted trial of the Supreme Court issues. No notice was given that the application to dismiss on the ground that a prior action was pending, and the trial of the issues of the Supreme Court action would be heard and decided simultaneously (R. 268-269, 264, 266, 267), and on the express direction of the Court the appellants were deprived of any notice. No notice was given that a jury trial to which the parties involved in the action were entitled under the positive law of the State would be denied (R. 265-266).

Without notice and before he knew the evidence if any to be produced by the petitioners, the Surrogate ruled that petitioner had settled with the Trust Company on June 8, 1936, and that the Trust Company may have a decree settling its account which would be *res adjudicata* "as to all transactions before June 8, 1936" (R. 108-110, 111, 113, 114, 268). The decree later made decides all the issues of the Supreme Court action to June 8, 1936, thus summarily depriving petitioners of a trial on the issues in the Supreme Court action, and of the opportunity to present their evidence and of the right to a jury trial, and which they had previously demanded.

Without a trial and without evidence they were charged with repudiation of their alleged agreement in issue in the prior action (R. 8, 86, 90-91, 94-96, 108, 109-113, 116, 117, 119-121, 130-131, 265).

In *Truax v. Corrigan*, 257 U. S. 312, 302 (*supra*), this Court said:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears

> before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

The Surrogate by his direction to the Trust Company to advise the Supreme Court *ex parte*, to decide the motion still pending to transfer the action in the manner directed by him and later ignoring the motion entirely, and consolidating the hearing to dismiss with the issues in a prior action impromptu and after the hearing (267-268) clearly violated the due process provision of the Constitution to these petitioners. The petitioners were thereby deprived of any notice of the trial of the issues of the Supreme Court action, and stripped of the right to submit their evidence. To instantaneously consolidate a conversion action at law on that hearing with the application to dismiss without notice, was an anomaly.

In *Palko v. Connecticut*, 302 U. S. 319, 327 (*supra*), Mr. Justice Cardozo said:

> "The hearing, moreover, must be a real one, not a sham or a pretense. *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103."

In *Ohio Tel. Co. v. Commission*, 301 U. S. 292, 304-305 (*supra*), Mr. Justice Cardozo wrote that the right to a fair hearing "is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimum requirement."

In *Jensen v. Union Pacific Ry. Co.*, 6 Utah 253 (4 LRA 724) (*supra*) the Court held that:

Due process of law means "that a party should have his day in court—a trial; which means the right of each party, plaintiff and defendant, to introduce evidence to establish his right to recover on the one hand, and to

establish his defense on the part of the other; after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not 'due process of law.' Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial."

In *Stuart v. Palmer,* 74 N. Y. 183 (*supra*) (cited by this Court in *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 424; *Wuchter v. Pizzutti,* 276 U. S. 13, 24, 25; the Court of Appeals of the State of New York summarizing the definition of due process of law under the Federal Constitution, said at p. 191:

> "It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this."

A jury trial has been demanded, and hence no consolidation could be made even if an order of transfer had been entered as petitioners involved were entitled to a jury trial separate and apart from any accounting proceeding. There was no account in issue and never could be as all the items of the former trust had been admittedly received except the participation at issue in the Supreme Court.

While a State law may deprive a litigant of a jury trial (*Walker v. Sauvinet,* 92 U. S. 90, 93), a litigant deprived of a jury trial in direct violation of a State law granting such trial as the established mode of procedure is deprived of his rights under the Fourteenth Amendment.

*Frank v. Mangum,* 237 U. S. 309, 326, *supra.*

It follows from the aggregate of the above recitals that the hearing was not "* * * conducted according to the

settled course of judicial proceedings as established by the law of the State," and that it did not include "notice, and a hearing, or an opportunity to be heard, before a Court of competent jurisdiction, according to established modes of procedure," and hence was not "'due process' in the constitutional sense."

*Frank v. Mangum,* 237 U. S. 309, 326 (*supra*).

In *Windsor v. McVeigh,* 93 U. S. 274 (*supra*), an answer and claim filed to a proceeding to confiscate the defendant's property were stricken from the file and his property was confiscated. Here the same result was accomplished. The Surrogate, ignoring the issue presented, decided the issues in an action in another court without notice and without jurisdiction, and thereby one quarter of remainderman's inheritance (R. 64) was confiscated.

This Court held that there could be no judgment without a proper trial. The Court approving of the statement by Mr. Justice Swayne, quoted in the opinion, that sanctioning such a procedure would be a blot upon our jurisprudence and civilization, and contrary to the first principles of social compact and of the right administration of justice, said, referring to this quotation (p. 277):

> "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

and further

> "It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

The notice which a party must receive must be an adequate notice clearly apprising the other party of the issues to be tried and limited to the pleadings.

In *Saunders v. Shaw,* 244 U. S. 317 (*supra*), this Court held that it was a violation of the due process clause of the Constitution to deny a party the right to present his evidence in a state court on one issue on which the plaintiff's evidence was presented, and later ruled inadmissible, and upon which evidence the Appellate Court based its reversal on the ground that the evidence rejected by the Trial Court was admissible. Here petitioners have been deprived the right to submit evidence on all the issues.

In *Georgia Railway Company & El. Co. v. Decatur,* 295 U. S. 165, 171 (*supra*), this Court held that the refusal of a state court to admit in defense of a suit to collect a tax any evidence tending to prove that no benefit resulted on the ground that such evidence was immaterial, amounts to a denial of a hearing on that issue, and violates the due process clause of the Fourteenth Amendment.

That evidence was offered under proper pleadings. Here said petitioners were ordered extempore to produce their evidence under the pleading in another action not in issue under the pleadings on that hearing and made findings without any trial to these petitioners.

Notwithstanding the rulings of the Surrogate on the hearing (R. 97-98, 99-100, 110, 111), petitioners were justified in relying on the premise that the Surrogate would adhere to issues presented in the final decision to

be rendered after the hearing as set forth in the trial memorandum submitted to him.

The Surrogate did not rule at the opening of the hearing that he had jurisdiction and order the parties to proceed (187 N. Y. 101 at 102 [Mem.]). After the opening statements of counsel, he said, "Proceed," presumably with the proof of the issues presented by the pleadings before him (R. 92). It was not until late in the hearing, at first merely by inference from the rulings made (R. 97, 100) that petitioners were apprised that the Surrogate would make a decree "as to all transactions before June 8, 1936" (R. 110-111). Petitioners' attempt to place their objection and position fully upon the record was frustrated by the interruptions of the Surrogate and the Trust Company (R. 101, 110-121). It was not until the decree was made that petitioners knew that a decision of the issues of the Supreme Court action had been incorporated therein.

It could not reasonably be expected when the petitioners came to the hearing to try the only issue set forth in the answer, that they should have anticipated that their Constitutional rights would be violated, and anticipatorily so asserted on the record before the decision was made on April 16, 1940 (173 Misc. 1042), several days after the hearing.

When the petitioners' brief was submitted in the Appellate Division setting forth that the petitioner had been deprived of a trial of the issues in the Supreme Court by the anomalous proceeding taken, the attention of that Court was called to the fact that the motion to transfer the action was still undecided by Mr. Justice Levy, before whom it was pending. It was withdrawn by the Trust Company after petitioners' brief had been served (R. 280-281).

It was not until the case was determined by the Appellate Division that it appeared that petitioners' constitutional rights had been invaded, and the petitioners so argued in the Court of Appeals and set forth at length the argument here presented that they had been unconstitutionally deprived of a trial of the issues in the Supreme Court action without a hearing, and without an opportunity to be heard, and without pleadings in the Surrogate's Court, upon which to base the findings made and without jurisdiction. The claim was reiterated in the reply brief (R. 290-294).

On the motion for reargument the petitioners reiterated that the claims above asserted were made under the due process clause of the Federal Constitution. The motion was made in order to clarify any possible claim of ambiguity of the Constitutional right asserted, in view of the fact that the Court of Appeals overlooked these constitutional claims (R. 290-294). It was remotely possible that the Trust Company may have contended that the New York State Constitution is relied upon. These facts are admitted by the failure of the Trust Company to submit any affidavit to the contrary. On the motion for reargument it disclaimed any such contention. By denial of reargument, the Court of Appeals makes similar disclaimer, otherwise reargument would have been granted, because "some question decisive of the case and duly submitted by counsel has been overlooked by the Court or that the decision is in conflict with a statute or controlling decision, to which the attention of the Court was not drawn through the neglect or inadvertence of counsel."

*Fosdick v. Town of Hempstead,* 126 N. Y. 651, 652.
*People v. Patrick,* 183 N. Y. 52, 53.

Hence the petitioners are entitled to a writ of certiorari to the Surrogate's Court of New York, where the mandate

of the Court of Appeals reposes, and the judgment has been entered in that court making the judgment of the Court of Appeals the judgment of the Surrogate's Court (R. 285-287).

*Missouri v. Gehner,* 281 U. S. 313, 320.

## III.

**The Trust Company proved that the petitioners involved have a meritorious cause of action, and proved the main facts thereof.**

Having shown that the petitioners involved have been deprived of a trial of their cause of action without due process of law, it is unnecessary to prove that said petitioners will succeed on a trial.

*Saunders v. Shaw,* 244 U. S. 317, 319.
*Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673, 681.

Such proof, however, emphasizes the violation of petitioners' constitutional rights. It has been proven to a considerable extent under the preceding points.

Under the document of May 26, 1936, the Trust Company undertook to deliver unencumbered assignments of the participations and the document was delivered on the condition that such assignments would be delivered, both expressed and implied (R. 133-147, 96, 148-149, 101, 153-155). The document, unsigned by the Trust Company and without seal (R. 141), having been delivered before any of the items therein recited as transferred and assigned, were actually transferred and assigned was void when delivered and was without consideration.

*Stiebel v. Grosberg,* 202 N. Y. 266.

*McManus v. Biddison,* 152 Misc. 239, 241; affirmed 242 App. Div. 623.
*Dambmann v. Schulting,* 75 N. Y. 55, 59.

It could not become effective until compliance with the condition under which it was given and the Trust Company had delivered her property unencumbered to the remainderman.

*Barnes v. Southfield Beach Co.,* 202 N. Y. 301.
*Hasbrouck v. Van Winkle,* 261 App. Div. 679.

In a letter of March 6, 1936 the Trust Company represented the investment as a salutary one (R. 98, 150-151), and two months thereafter wrote the remainderman's father who lived at a different place than the remainderman (R. 98, 150, 103, 159) that the property which it had represented two months before as a paying investment had been operated at a loss for a year, and that it had reduced the rate of interest on the investment on its initiative (R. 98, 152).

The account filed by the Trust Company shows that no appraisal of this property was made in 1936 at the time that it made its representation (R. 66, 169).

The Trust Company delivered a certificate retaining proprietary dominion over her property (R. 123, 202-205). Such delivery, together with the other acts alleged, constituted conversion.

*Mendelson v. Boettger,* 257 App. Div. 165, 169-170, 171; affirmed 281 N. Y. 747.
*Laverty v. Snethen,* 68 N. Y. 522, 524.
*Malmud v. Blackman,* 251 App. Div. 192, 194.
*National Surety Company v. Manhattan Mortgage Company,* 185 App. Div. 733, 739; affirmed 230 N. Y. 545.
*Fisher v. Title Guarantee & Trust Company,* 262 App. Div. 293, 296, 299; affirmed 287 N. Y. 275.
*Matter of Allen,* 142 Misc. 113, 117-120.

Acknowledgment of the receipt of the confiscatory certificate sent is not an assent to the confiscation. A receipt is not a contract, and if it were an agreement to receive less than one is legally entitled to, is void for want of consideration.

*Mance v. Hossington*, 205 N. Y. 33.
*Seeley v. Osborne*, 220 N. Y. 416, 421.

The Trust Company having been guilty of conversion, there was no duty on the petitioners to repudiate the receipt and to make any complaint or demand before beginning suit.

*MacDonnell v. Buffalo L. T. & S. D. Co.*, 193 N. Y. 92, 101.
*Bostwick v. Burnett*, 74 N. Y. 317, 319.
*Chandler v. Chapman*, 218 App. Div. 773.
*Buckingham v. Vincent*, 23 App. Div. 238, 240.
*Schmid v. Garfield National Bank*, 64 Hun 298, 300.
*Stickles v. Bernier*, 139 Misc. 405, 409.
Also *J. G. White & Co. v. Ball Engineering Co.*, 298 Fed. 709, 713; certiorari denied 265 U. S. 596.

However, she did repudiate the receipt and certificate (R. 105, 170-171), and immediately protested when the interest was reduced (182, 101, 185).

Having agreed to give an assignment of the participation, the Trust Company cannot plead impossibility of performance, or that it was impracticable to give such assignment. However, there is no impossibility of performance, and no impracticability in delivering such an assignment. As a holder of this participation she was a tenant in common with the Trust Company in the mortgage involved.

*Matter of Lawyers Title and Guaranty Co.*, 157 Misc. 516, 519.
*Matter of New York Title and Mortgage Co.*, 160 Misc. 67, 73-74.
*Matter of People (Westchester Tit. & T. Co.)*, 268 N. Y. 432.

The rights and liabilities of tenants in common as to collection of rent, payment of mortgage interest, and the foreclosure thereof are well settled. A tenant in common may have her portion of the rent paid to her directly.

*T. G. W. Realties, Inc. v. Long Island Bird Store Inc.*, 151 Misc. 918, 924.
McAdam, Landlord & Tenant (5 ed.), 1083.

The Trust Company repeatedly and irrevocably admitted that it never gave an assignment of the participation to the petitioner, Helen V. Z. Anthony the remainderman, and is still accountable for it (112, 113-114, 115, 117, 118, 119). Its supplemental account filed conclusively so demonstrates (R. 63-65, 67-68, 70). The document of May 26, 1936, provides that it is made in consideration of the delivery *inter alia* of the participations involved (139-140). Therefore the release is ineffective as to the undelivered participation, because a release like a decree on an accounting is effective only as to items delivered, and is not binding as the assets remaining in its hands.

*Meredith v. First Trust Co. of Albany*, 260 App. Div. 517 *(supra)*.
*Joseph v. Herzig*, 198 N. Y. 456, 461-463 *(supra)*.
*Matter of Denbosky*, 245 App. Div. 93 *(supra)*.

All of which is demonstrated by the evidence of the Trust Company and a few isolated documents submitted by petitioners, offered solely in support of the allegations in their answer, that no accounting was necessary and that the Trust Company purported to act as custodian and not as trustee, and the Court had no jurisdiction in the premises (R. 125). Petitioners have hitherto been deprived of the right to so demonstrate supplemented by their evidence upon any trial.

It follows plainly and conclusively that the petitioners Helen Van Zile Anthony and William D. Smith by the decree made as affirmed by the Court of Appeals of the State of New York, have been forever barred of a trial of the issues framed by the pleading in the Supreme Court action and have been forever stripped and deprived of their property involved in that action without due process of law, as also has petitioner J. V. Z. Anthony by the decree on issues in which he has no interest and was not a party and all the petitioners have been deprived of their property by a punitive decree awarding costs of a contested accounting and an abortive trial of the conversion action, when no accounting proceeding was or could be at issue, without due process of law and by the judgments for costs on affirmance of a void decree.

## IV.

**The application for a writ of certiorari to the Surrogates' Court, New York County, should be granted.**

Respectfully submitted,

ELI J. BLAIR,
Counsel for Petitioners.

## APPENDIX.

**Text of essential portion of New York Statutes and Rule relied on and referred to in this application with applicable parts italicized for convenience.**

Section 40, subdivision 9 of the New York Surrogate's Court Act:

> "§40. GENERAL JURISDICTION OF SURROGATE'S COURT.
>
> "Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:
>
> * * * * * *
>
> "9. To transfer, for trial in the surrogate's court of the counties of New York, Kings, Queens, Bronx, Richmond, Westchester and Nassau any action at law now pending or which may hereafter be brought in any court, other than the supreme court, in which the representative of an estate is a party or the trial and determination of which is necessary or appropriate to the completion of the administration of an estate pending in such surrogate's court; *and to receive for trial in the surrogate's court of any of the counties mentioned in this subdivision any such action pending in the supreme court which may by order of the supreme court be transferred to the surrogate's court of the counties mentioned in this subdivision, on the consent of the surrogate evidenced by an order or otherwise as may be prescribed by the rules of the surrogate's court having jurisdiction. In the event such transfer shall be made any party to such action so transferred may, pursuant to rule of the surrogate's court having jurisdiction, demand of right, a jury trial in the surrogate's court if such party was at the time of such transfer entitled to such trial under the practice of the court from which the transfer was made.*"

Section 41, subdivision 4 of the New York Surrogate's Court Act:

"§41. JURISDICTION OF PERSONS, PUBLIC OFFICERS, COMMISSIONS OR BODIES; WHEN AND HOW OBTAINED.

"The surrogate's court, in any action or proceeding before it, shall have jurisdiction of the following:

* * * * * *

"4. All parties to any action at law which pursuant to the provisions of the surrogate's court act or the civil practice act may be transferred to it."

Section 65, New York Surrogate's Court Act:

"§65. CONSOLIDATION OF ACTIONS AND PROCEEDINGS.

"At any time when two or more proceedings are pending involving in whole, or in part, the same matters, the surrogate may, in his discretion, consolidate such proceedings upon such terms as shall appear to him to be equitable and just; but without prejudice to the power of the surrogate to make any subsequent order or decree in either or any of them. *The surrogate shall have like power to consolidate with any proceeding an action at law transferred to the surrogate's court of the counties of New York, Kings, Queens, Bronx, Richmond, Westchester and Nassau.*"

Section 168, New York Civil Practice Act:

"§168. STAY UPON APPLICATION FOR REMOVAL OF ACTION TO SURROGATE'S COURT OR SUPREME COURT.

"An order to stay proceedings for the purpose of affording an opportunity to make application for removal of an action to the surrogate's court of the counties of *New York,* Kings, Queens, Bronx, Richmond, Westchester and Nassau, or to

the supreme court may be made by the surrogate, the county judge or a judge authorized to make such an order in the supreme court, and with like effect and under like circumstances."

Section 190-a, New York Civil Practice Act:

"§190-a. REMOVAL OF ACTION TO SURROGATE'S COURT FROM SUPREME COURT.

"The supreme court upon the application of either party to an action at law pending therein may, in its discretion and upon the prior order of the surrogate of the counties of *New York*, Kings, Queens, Bronx, Richmond, Westchester and Nassau transfer to a surrogate's court of the counties mentioned in this section having jurisdiction of the administration of a decedent's estate, any action at law pending in such supreme court affecting the administration of such estate. The order of transfer shall be effective from the entry thereof in the office of the county clerk. The right of jury trial, if any, shall be preserved and the subsequent proceedings in the surrogate's court of the counties mentioned in this section shall otherwise be in accordance with the practice and procedure in such court. (Added L. 1934, ch. 352, in effect Sept. 1; L. 1936, ch. 199, in effect March 28, adding 'and Nassau.')"

Rule XI, Surrogate's Court, New York County:

"XI. CONTESTED ACCOUNTINGS.

"*On any accounting* by an executor, administrator, temporary administrator, guardian or *trustee any* creditor or *other party interested may file objections thereto in writing at any time within eight days after the account is marked for decree or within such further or other time as shall be allowed by the surrogate. Such objections must be served upon the accounting party or his attorney before the filing thereof in this court.* A special guardian appointed in an accounting proceeding shall file his report or objections within eight days after his appointment unless for cause shown his time to file such report or objections be extended by the surrogate."

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IN THE

# Supreme Court of the United States

**October Term, 1941.**

**No. 1020**

HELEN VAN ZILE ANTHONY, WILLIAM D. SMITH and JESSE VAN ZILE ANTHONY as Executor of the will of Fannie J. Anthony,

*Petitioners,*

*v.*

UNITED STATES TRUST COMPANY OF NEW YORK,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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New York City.

March 13, 1942.

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

The claim that a question arising under the federal constitution is presented in this case apparently never entered counsel's mind until after the case had been tried and decided by the trial court and the decree affirmed by the Appellate Division and by the Court of Appeals. Then counsel moved for reargument in the Court of Appeals (289) and for the first time there appeared in this record any mention of the federal constitution.

The only constitutional claim that found expression throughout the course of the trial and the successive appeals was that in some way petitioner had been deprived of the trial by jury which he was seeking in another ac-

tion—the "Supreme Court action" so frequently referred to in the petition. Even had trial by jury been involved in the present case, its denial in a judicial proceeding in a state court would have presented no question under the federal constitution, which says nothing about jury trials in actions or proceedings in the state courts.

As to any important (or unimportant) federal question decided in a way probably not in accord with applicable decisions of this court, the petition leaves us in the dark. Of the two "Questions Presented" (Petition, p. 3), surely the second question (bottom of p. 3), so far as one can find a distinct question formulated in its diffuse verbiage, presents no federal issue. It merely reflects counsel's dissatisfaction with the court's decision. The first question is a confused jumble of imaginings. The court did not try, or purport to try, the issues in another action. It tried the issues in the proceeding before it (4-14). What troubles counsel is that the trial and determination of those issues destroyed some of the contentions one of the petitioners was making in another suit. This is not an uncommon incident of a trial and judgment, and its occurrence in no way offends the due process clause of the fourteenth amendment, nor until the motion for reargument in the state court of last resort had it ever been suggested that the federal constitution was in any way involved.

The petition and brief run to nearly fifty pages, yet we fear that even after their prolix presentation this court will have some difficulty in finding what this case is all about. What really happened is as follows:

Helen V. Z. Anthony, one of the petitioners, was remainderman under a testamentary trust which fell in on October 13, 1935 (18). Some months afterwards, the trustee (respondent on this application) presented to her its account of its proceedings (5, 6) with a requested instrument of accounting and release, and after keeping it for

five or six months, during which period she employed counsel, she executed and delivered a release accepting and approving the account (6). Some two years and a half thereafter, another of the petitioners, one William D. Smith, began an action against the trustee (20) alleging that in regard to one particular asset of the trust estate—a mortgage participation which because of its nature could not be completely disposed of until the liquidation of the entire mortgage—the trustee had *converted* it (229), and in his complaint he went into the whole history of the investment both before and after the release (223-230). The alleged "conversion" consisted in a reduction of the mortgage interest rate, made after the release, the participation being one of $10,000 in a $110,000 mortgage (229). In his complaint Smith alleged that he held an assignment from Helen V. Z. Anthony of the cause of action alleged in the complaint (230). Miss Anthony was quite evidently repudiating her release, although Smith's allegation of conversion, constituting part, but not all, of his "cause of action" alleged to have been acquired on assignment, was laid as of a time subsequent to the release.

How many more persons might turn up claiming to be assignees of causes of action relating to the trust estate respondent could not know. It accordingly promptly brought a proceeding in the Surrogate's Court, the tribunal in which the accounts of testamentary trustees are normally heard and settled, praying that the validity of its release be determined, and, as to the period falling without the term covered by the release, for the judicial settlement of its account, or for the whole period if the release itself were not effective (15-24).

This proceeding came duly on for trial, for which the customary notice of trial was given (271). Notices to produce specified documents on the trial were served by both sides (271, 272). Petitioners had interposed an answer contending that Smith's suit involving one item of the

account was a bar to the accounting proceeding (71, 77), and petitioners urged this defense at the outset of the hearing (86). It was overruled and the trial proceeded, petitioners not having raised any other issue in their answer, and it is the decree rendered by the Surrogate's Court, approving and settling the trustee's account and finding the release in all respects valid, affirmed by the Appellate Division and by the Court of Appeals, of which petitioners here seek review. It should be noted that as to all matters occurring after the final delivery of the release the Surrogate's Court held that its jurisdiction did not extend, and the decree leaves undetermined, so far as that proceeding is concerned, everything occurring after that date (14). Petitioner Smith still has his "conversion action" for whatever it may be worth, for among the things thus left undecided is the alleged conversion claimed to have been wrought by the reduction of the interest. The case whereof certiorari is sought was thus an ordinary judicial proceeding, wherein all the present petitioners were brought in by service of process or voluntary appearance, where they all joined in an answer, received and served notice of trial and where the case proceeded to trial and judgment.

Of such a judicial determination, how may it be contended that any one was deprived of the due process of law guaranteed by the United States constitution? As we have said, such an idea was never voiced by counsel until judgment had been rendered and affirmed by the intermediate court and the court of last resort.

Petitioners' real grievance is that they think the case was decided the wrong way. They contend that the trial court should have held that because in his own "conversion" action one of the petitioners, Smith, claiming to be an assignee of a cause of action affecting a single item in the account, had made certain allegations relating to the trust administration, therefore no court should presume

to entertain a proceeding for the judicial settlement of the trustee's account until Smith's action had been disposed of.

Because the trial court and both the appellate courts disagreed with petitioners and held that the pendency elsewhere of such "conversion" action by a single party in respect to a single item did not divest the court of jurisdiction, the petitioners now claim that due process of law has been denied them.

The determination of that question was asked of the trial court. It was explicitly within the issues. Petitioners had categorically raised it in their answer.

As a matter of law the decision was right (*Nat. Fire Ins. Co.* v. *Hughes,* 189 N. Y. 84; and the Surrogate's opinion itself, *Matter of James,* 173 Misc. (N. Y.) 1042). As the trial court said (265-266; reported in *Matter of James,* 173 Misc. (N. Y.) 1042, 1044-5) ):

> "Apparently the plaintiff assumes that she is entitled as a right to a trial of the action by a jury. It would be a novel but disastrous departure if beneficiaries could bring separate actions at law for damages based upon alleged acts of negligence or other basis of surcharge against a fiduciary. Under the system of concentration of the disposition of all questions involved in the fiduciary's conduct, in an accounting or other appropriate proceeding in the Surrogate's Court or on the equity side of the Supreme Court, all such questions are determined with all of the parties before the court in an expeditious manner. The development of the jurisdiction of Chancery over accountings grew out of the dissatisfaction and delay resulting from the common-law action of account where the entire action was broken up into a series of separate trials and after the verdict in each trial the result was certified back to the auditor appointed to examine the account (*Matter of Beare,* 122 Misc. 519; aff'd 214 App. Div. 723). Delay and expense thereby resulted. That system long ago fell into disuse both in England and in this State. It was supplanted by the more effectual and speedy remedy under the concentrated

jurisdiction of a court of equity (*Malone* v. *Saints Peter & Paul's Church*, 172 N. Y. 269, 276; *Matter of Raymond* v. *Davis*, 248 id. 67, 72)."

But even had it been wrong, it was a decision rendered on an issue specifically raised, in a proceeding whereof the court had jurisdiction of all the parties and all the present petitioners appeared and participated in the trial. After hearing them the court held that the ~~finding~~ PENDENCY of Smith's action was no bar to the accounting proceeding. The conception of denial of the due process of law guaranteed by the United States constitution seems never to have entered counsel's mind till after the affirmance.

The record reveals no error; least of all does it reveal lack of due process of law.

**The application for certiorari should be denied.**

March 13, 1942.

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